Supreme Court, U.S.
FILED
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No. 08-619

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL CARLISLE

Petitioner

v.

STATE OF OHIO

Respondent

On Petition For Writ Of Certiorari
To the Supreme Court of the State of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED PETITIONER DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTH AND FOURTEENTH MENDMENTS TO THE UNITED STATES CONSTITUTION IN OVERRULING PETITIONER'S MOTION TO SUPPRESS EVIDENCE.

TABLE OF CONTENTS

Page No.

Statement of the Basis for Jurisdiction 1

Constitutional Provisions 1

Statement of the Case and Facts 1

Argument 3

Appendix 6

Appendix Page No.

Entry, Supreme Court of Ohio 1

Opinion, Lawrence County Court of Appeals 2

Judgment Entry, Lawrence County Court of Appeals 9

TABLE OF CITED AUTHORITIES

State vs. Bailey (1989), 1989 WL 130855 3

Brown vs. Illinois (1975), 422 U.S. 590 4

Minnesota vs. Dickerson (1993), 508 U.S. 366 4

State vs. Dotson (1990), 66 Ohio App.3d 182 4

State vs. Evans (1993), 67 Ohio St.3d 405 3

State vs. Hunter (1994), 98 Ohio App.3d 632 3

State vs. Milhouse (1999), 133 Ohio App.3d 3

In re Smalley (1989), 62 Ohio App.3d 435 4

Terry vs. Ohio (1968), 392 U.S. 1 3

State vs. Thompson (1995), 103 Ohio App.3d 498 3

State vs. Warren (1998), 129 Ohio App.3d 598 3

State vs. White (1996), 110 Ohio App.3d 347 3

CITATIONS OF OFFICIAL REPORTS

State vs. Carlisle, 08/06/2008 Case Announcements, 2008 -Ohio-3880 ..... App.1

State vs. Carlisle, Lawrence App. No. 07CA16, 2008-Ohio-744 ..... App. 2

STATEMENT OF THE BASIS FOR JURISDICTION

On August 6, 2008, the Supreme Court of Ohio declined to grant Petitioner leave to appeal the February 19, 2008 decision of the Fourth District Court of Appeals for the State of Ohio, which decision affirmed the April 9, 2007 ruling of the Court of Common Pleas for Lawrence County, Ohio denying Petitioner's Motion to Suppress Evidence. Jurisdiction if conferred upon this Court pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL PROVISIONS

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated..." U.S. Const. Amd. IV

".... [N]or shall any State deprive any person of life, liberty or property without due process of law..." U.S. Const. Amd. XIV, Sec. 1.

STATEMENT OF THE CASE AND FACTS

The Lawrence County, Ohio Grand Jury indicted Petitioner on November 6, 2006 on one count of Trafficking in Drugs, a felony of the first degree, and one count of Possession of Drugs, a felony of the second degree. Prior to the start of trial, the State moved to amend count one to a felony of the second degree and count two to a felony of the third degree. The trial court granted said motion. (T. 17). On April 9, 2007, Petitioner filed a Motion to Suppress, requesting the trial court to suppress the seizure of the crack cocaine from his person and the resulting custodial statement, on the basis that the search and seizure

violated the Petitioner's Federal Constitutional rights under the Fourth and Fifteenth Amendments to the United States Constitution. On April 9, 2007, the trial court held an evidentiary hearing on said Motion. (Suppr. Hng. T. 5). The trial court denied Petitioner's Motion. (Suppr. Hng. T. 77). On April 12, 2007, Petitioner waived his right to a jury trial and a court trial began. (T. 2-5). The trial court convicted Petitioner of both charges and sentenced him to a term of five years incarceration. (T. 101). The trial court filed its Judgment Entry on May 9, 2007. Petitioner perfected a timely appeal on June 7, 2007 to the Lawrence County Court of Appeals, Fourth Appellate District. In his brief, Petitioner raised a single Assignment of Error, asserting that the trial court had abused its discretion in overruling Petitioner's Motion to Suppress. That Assignment of Error alleged the same Constitutional violations as had Petitioner's Motion to Suppress. On February 19, 2008, the Court of Appeals affirmed the judgment of the trial court. On April 2, 2008, Petitioner filed a Notice of Appeal in the Supreme Court of Ohio, asking that court to invoke its discretionary jurisdiction. In his Memorandum in Support of Jurisdiction, Petitioner raised on Proposition of Law. That Proposition of Law asserted that the trial court had abused its discretion in overruling his Motion to Suppress, and asserting violations of Petitioner's Federal Constitutional rights under the Fourth and Fourteenth Amendments.

The testimony at the suppression hearing revealed that in the evening hours of October 18, 2006, agents from various law enforcement agencies in Lawrence County were searching for one Tyrone Black, whom they suspected of trafficking in drugs in a certain area of Ironton. (Suppr. Hng. T. 9-10). During their search, they espied Mr. Black walking down Eighth Street near Madison Street in Ironton, accompanied by Petitioner. (Suppr. Hng. T. 11-12). One of the officers observed that Petitioner was carrying an opened bottle of beer. (Suppr. Hng. T. 42). The

officers stopped both Black and Petitioner. (Suppr. Hng. T. 43). During a pat down search of Petitioner, one of the officers discovered a large baggie containing approximately 7.7 grams of crack cocaine in Petitioner's pants pocket. (Suppr. Hng. T. 47). The officers arrested Petitioner and took him to the Ironton Police station and interrogated him. (Suppr. Hng. T. 68-71). During that session, Petitioner admitted that Black had given him the crack cocaine earlier, and that it was indeed his (Petitioner's). (T. 87).

ARGUMENT

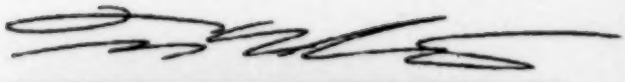
Clearly, this encounter between Petitioner and law enforcement is governed by *Terry vs. Ohio* (1968), 392 U.S. 1, and its progeny. But the reasonable suspicion required for a *Terry* stop, does not, standing alone, justify an automatic authorization for law enforcement to conduct a frisk of the detainee. *Terry*; *State vs. White* (1996), 110 Ohio App.3d 347. The officer must have a reasonable suspicion that the detainee is armed in order to justify a frisk of the detainee's outer clothing. *State vs. Warren* (1998), 129 Ohio App.3d 598. In the instant case, the detaining officers had no reasonable suspicion that Appellant was armed, or that he was engaged in any criminal activity other than the public consumption of an alcoholic beverage. (Suppr. Hng. T. 15; 24; 25-6; 42; 44).

Assuming, without conceding, that the detaining officers were justified in conducting a *Terry* pat down, the object seized in this case, a plastic baggie of crack cocaine, was still be inadmissible. In order to justify reaching into a detainee's pocket to retrieve an item believed to be a weapon, the officer's belief that the item is a weapon must be reasonable. *State vs. Evans* (1993), 67 Ohio St.3d 405; *White*, supra. *See State vs. Hunter* (1994), 98 Ohio App.3d 632; *State vs. Bailey* (1989), 1989 WL 130855; *State vs. Thompson* (1995), 103 Ohio App.3d 498; *State vs. Milhouse*

(1999), 133 Ohio App.3d 527; *State vs. Dotson* (1990), 66 Ohio App.3d 182. In the instant case, Petitioner asserts that the officers' contention that the contraband found in his pants pocket could have been a weapon is clearly not reasonable. (Suppr. Hng. T. 47; 62-3; 74-5). Additionally, Petitioner asserts that the seizure in this case does not fall within the "plain feel" exception. *Minnesota vs. Dickerson* (1993), 508 U.S. 366. For all of the above reasons, Petitioner asserts that the trial court should have suppressed the contraband seized from his person on October 18, 2006. Immediately after the seizure of the contraband, Petitioner was arrested and taken to the Ironton Police Department for interrogation. (Suppr. Hng. T. 68-71). After being advised of his *Miranda* rights and waiving the same, he made an inculpatory statement to the arresting officers. (T. 87). The trial court should have suppressed that statement as "fruit of the poisonous tree".

Appellant's inculpatory statement, made within ninety minutes of his detention and arrest, should have been suppressed. That statement was the direct result of Petitioner being confronted with the seizure of the contraband on his person. Since that seizure violated his constitutional rights, the statement should have been suppressed. The giving of *Miranda* warnings, and Appellant's waiver of those protections, do not suffice to remove the taint of the illegal search and seizure discussed *supra*. *Brown vs. Illinois* (1975), 422 U.S. 590; *In re Smalley* (1989), 62 Ohio App.3d 435.

Accordingly, Petitioner asserts that the officers had no justification upon which to base a search of his person. Their actions in conducting the search of his person patently violated the United States Constitution, and applicable case law, for the reasons stated. Additionally, and for the reasons stated above, the statements made by Petitioner following the improper search and arrest also violate United States Constitution. Accordingly, the trial court should have suppressed both the contraband and the statement.



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APPENDIX

Page No.

Entry, Supreme Court of Ohio, August 6, 2008 1

Opinion, Lawrence County Court of Appeals, February 19, 2008 2

Judgment Entry, Lawrence County Court of Appeals, February 19, 2008 9

THE SUPREME COURT OF OHIO

State of Ohio — Case No. 2008-0622

V. — ENTRY

Daniel Carlisle

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question

(Lawrence County Court of Appeals; No. 07CA16)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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APPENDIX 1

COURT OF APPEALS
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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 07CA16

Vs.

DANIEL R. CARLISLE, DECISION AND JUDGMENT ENTRY

Defendant-Appellant.

APPEARANCES:

Todd W. Barstow, Columbus, Ohio, for Defendant-Appellant.

J.B. Collier, Jr., Lawrence County Prosecutor, and W. Mack Anderson, Assistant Prosecutor, Ironton, Ohio, for Plaintiff-Appellee.

APPENDIX 2

McFarland, J.:

{¶1} Defendant-Appellant, Daniel R. Carlisle, appeals from the decision of the Lawrence County Court of Common Pleas. The court overruled his motion to suppress both evidence of the seizure of crack cocaine from his person and his subsequent admission that the drugs belonged to him. By searching him, Appellant contends law enforcement officers violated due process protections guaranteed by the Ohio and United States Constitutions. However, considering the totality of the circumstances, we find the police conducted a valid *Terry* stop and weapons search.

{¶2} Accordingly, we overrule Appellant's assignment of error and affirm the decision of the trial court.

I. Facts

{¶3} In October of 2006, officers of the Lawrence County Drug Task Force, including Officer James Milleson and Detective Aaron Bollinger, encountered Appellant while patrolling a high-crime area, well known for drug trafficking, in Ironton, Ohio. Before the encounter, the officers had been specifically searching for an individual named Tyrone Black, who was wanted in reference to drug activity from the previous night. When they succeeded in locating Black, he was walking along the street with Appellant. At the time, Appellant was carrying two bottles of beer, one of which was open.

{¶4} Prior to the encounter in question, the officers were already familiar with Appellant's criminal history, including convictions for drug offenses and an assault on a police officer. Additionally, they were aware that he had only recently been released from prison back into the community. Immediately before exiting their vehicle,

Detective Bollinger warned Officer Milleson to be very

cautious in approaching Appellant.

{¶5} Officer Milleson approached Appellant and asked him to stop, but Appellant initially ignored him and tried to walk past. The Officer had to physically step in front of Appellant to prevent him from walking away. He then asked Appellant for his name. Appellant gave his correct name and asked why he was stopped. Officer Milleson informed him it was because of the open container he was carrying, at which time he took the beer from Appellant. The Officer testified that, immediately after this, Appellant's had appeared to go toward his right pocket. Officer Milleson asked Appellant to keep his hands in sight because he did not want him to reach into his pocket. Appellant complied with the request.

{¶6} According to the Officer's testimony, during this exchange, Appellant acted anxious, "kind of fidgety, like he was looking for an out. I didn't know whether he was going to flee or possibly do something else." At that point, Officer Milleson informed Appellant he was going to pat him down for safety reasons. When Officer Milleson placed his hands on Appellant's right pocket, he immediately felt an object which concerned him and asked Appellant what it was. "Then [Appellant] looked at me and said, 'Crack.' And I said, 'What'? He said, "It's crack cocaine." At that point, Appellant was secured with handcuffs. The officers then removed a large baggie from Appellant's pocket, containing approximately 7.7 grams of crack cocaine, and he was placed under arrest. Later, during questioning at the police station, Appellant admitted that the crack cocaine was his.

Appendix 2

{¶7} The Lawrence County Grand Jury indicted Appellant on one count of trafficking in cocaine and one count of possession of cocaine. Appellant filed a motion to suppress both the seizure of the crack cocaine from his

person and his subsequent admission that it belonged to him. After a hearing on the issue, the trial court denied the motion. Appellant waived his right to a jury trial and the matter proceeded to trial. The trial court found him guilty on both counts and sentenced him to five years incarceration. On June 7, 2007, Appellant filed the current appeal.

II. Assignment of Error

{¶8} 1. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION TEN OF THE OHIO CONSTITUTION IN OVERRRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

III. Legal Analysis

{¶9} In his sole assignment of error, Appellant contends the trial court erred in not suppressing evidence of the seizure of crack cocaine from his person. Similarly, he contends his statement to the police, confirming that the drugs were his, should have been suppressed. Initially, we address the appropriate standard of review.

{¶10} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Book*, 165 Ohio App.3d 511, 847 N.E.2d 52, 2006-Ohio-1102, at 9; *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. In a motion to suppress, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and evaluate witness credibility. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8; *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Appellate courts must accept a trial court's factual findings so long as competent and credible evidence

supports those findings. *State v. Metcalf* (1996), 111 Ohio App.3d 142, 145, 675 N.E.2d 1268; *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. A reviewing court then conducts a de novo review of the trial court's application of the law to the facts of the case. *State v. Anderson* (1995), 100 Ohio App.3d 688, 691, 654 N.E.2d 1034.

{¶11} In the case sub judice, Appellant contends that Officer Milleson, by making an investigatory stop, patting him down and removing the baggie of crack cocaine, violated his right to due process. In general, warrantless searches and seizures "are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. U.S.* (1967), 389 U.S. 347, 357, 88 S. Ct. 507, 19 L.ED.2d 576.

{¶12} In *Terry v. Ohio*, the U.S. Supreme Court ruled that one exception to the Fourth Amendment warrant requirement allows a police officer to conduct a brief investigative stop if the officer possesses a reasonable suspicion, based on specific and reasonable facts, which, taken together with rational inferences from those facts, warrants the belief that criminal behavior is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.ed.2d 889; see, also, *United States v. Brignoni-Ponce* (1978), 422 U.S. 873, 95 S.Ct. 2574. 45 L.ed.2d 607; *State v. Andrews* (1991), 57 Ohio St.3d 86, 565 N.E.2d 1271. To justify such an investigative stop, the officer must be able to articulate specific facts that would warrant a person of reasonable caution in the belief that the person stopped is about to commit a crime. *Terry* at 21-22. Additionally, the officer must have reason to believe the individual is armed. "...[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual,

regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. At 27. "The propriety of an investigative stop by a police officer must be viewed in light of the totality of the surrounding circumstance." *State v. Bobo* (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489, quoting *State v. Freeman* (1980), 64 Ohio St.2d 291, 18 O.O.3d 472, 414 N.E.2d 1044.

{¶13} In the case at bar, considering the totality of the circumstances, we find the police officers were justified in making an investigative stop. The encounter with Appellant occurred in a high crime area, known as a center of drug trafficking. Appellant was in the company of Tyrone Black, who was wanted for drug activity from the previous night and for whom the police were actively searching. Further, the officers know of Appellant's criminal history, including his involvement with illegal drugs. Additionally, and most obviously, the stop was justified because Appellant was carrying an open container of alcohol.

{¶14} We also find Officer Milleson was justified in patting Appellant down in a search for weapons. "The right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed." *State v. Evans*, 67 Ohio St.3d 405, 413, 1993-Ohio-186, 618 N.E.2d 162. As previously stated, Appellant was in a high-crime area known for drug trafficking and officers were aware of his criminal history, including the fact he had just recently been released from prison. Appellant did not initially comply with Officer Milleson's request to stop. His anxious behavior during the encounter led Officer Milleson to believe he was "looking

for an out." Further, Appellant was known to have had a prior arrest for assaulting a police officer and Officer Milleson had just been warned that Appellant posed a significant danger. Considering all these factors, plus Appellant's furtive movement toward his right pocket, Officer Milleson reasonably concluded that a pat-down for weapons was necessary. "Where a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the totality of the circumstances, the office

Appendix 4

may initiate a protective search for the safety of himself and others." *State v. Bobo* (1988), 37 Ohio St.3d 177, 524 N.E.2d 489, paragraph two of the syllabus.

{¶15} Officer Milleson testified that during the pat-down, he discerned an object in Appellant's right pocket and when he asked what it was, Appellant told him it was crack cocaine. Appellant argues that under a *Terry* search standard, police officers are not justified in reaching into a suspect's pocket unless the officer reasonably believes the item located during the pat-down is a weapon and, thus, Officer Milleson has no authority to remove the cocaine from his person during his search. However, once Appellant admitted the object found during the pat-down was cocaine, the *Terry* standard no longer applied. After Appellant admitted to possessing drugs, Milleson obviously had probable cause to search for, remove and secure the crack cocaine. As such, we overrule Appellant's assignment of error.

IV. Conclusion

{¶16} We conclude that there was competent, credible evidence to support the trial court's decision to overrule Appellant's motion to suppress. Considering the totality of the circumstances, the police were justified in making a *Terry* stop, frisking Appellant in order to search for

weapons and, upon his admission of possession, removing the drugs from his person. Accordingly, we overrule the assignment of error and affirm the decision of the trial court.

JUDGMENT AFFIRMED

Lawrence App. No. 07CA16
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LAWRENCE COUNTY

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court and application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-

five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Abele, P.J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY:/s/ Matthew W. McFarland
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.